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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WHITE WING DEVELOPMENT, INC.,
A CALIFORNIA CORPORATION,
DBA WHITE WING ASSOCIATES,
Petitioner,
VS.
COUNTY OF SOLANO,
BOARD OF SUPERVISORS OF THE COUNTY OF SOLANO,
PLANNING COMMISSION OF THE COUNTY OF SOLANO,
Respondents.

On Petition for Writ Of Certiorari
To The California Court of Appeal

REPLY BRIEF IN SUPPORT OF PETITION OF CERTIORARI

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INTRODUCTION

Petitioner White Wing Development, Inc. ("White Wing") asks the Court to decide that a landowner has a Fifth Amendment right to a judicial remedy for final governmental action mandating compliance with a development regulation that does not substantially advance any legitimate state interest. The regulation applied to White Wing in this case fails the "substantial advancement" test by a wide margin. It requires use of a sewage disposal method that poses significant human health risk, even though the use of a safer treatment method would not have allowed White Wing to build any more units than the density limits of the general plan permitted. (See Appendix D to Petition at 15-22).

In its opposition to the petition, respondent County of Solano ("County") flagrantly mischaracterizes White Wing's constitutional claim as a "facial" challenge to County's adoption of the development regulation in 1980, rather than a challenge to County's specific application of the regulation to White Wing's property in 1995. As stated in White Wing's petition for certiorari, the question it presented to the California courts, and on which it seeks this Court's review, is whether "[County's] regulation as applied to the development of White Wing's property violates this Court's established standards under the Fifth and Fourteenth Amendments . . ." (Petition at 11; see *id.* at n.21). On that question, County effectively has presented no argument and has provided the Court with no cogent ground upon which to deny review.

Note: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated.

ARGUMENT

A. WHITE WING HAS PRESENTED A RIPE AND TIMELY CHALLENGE TO COUNTY'S SEPTIC SYSTEM MANDATE AS APPLIED.

1. White Wing Has Challenged County's Specific Denial Of Any Residential Development That Does Not Rely On Septic Systems.

County's caricature of White Wing's taking claim as an untimely facial challenge is untenable. A "facial" challenge to a regulation asserts that it is unconstitutional in *every* application; an "as applied" challenge alleges that it is unconstitutional as applied to the claimant in the particular factual circumstances that give rise to the claim. *United States v. Salerno*, 481 U.S. 739, 745 and n.3 (1987); *Ada v. Guam Society of Obstetricians*, 506 U.S. 1011, 1012-1013 (1992) (Scalia and White, JJ., Rehnquist, C.J., dissenting from denial of petition for certiorari). White Wing has not alleged that County's septic system mandate is invalid in every application, but that its application to White Wing prevents White Wing, without substantial governmental justification, from developing its property in a manner otherwise permitted. Other landowners, not so constrained by County's application of the regulation, could make no such claim.[1]

As set forth in White Wing's Verified Petition (Appendix D to the Petition), as described by the California Court of Appeal, and as revealed by the record, the essential facts underpinning White Wing's claim are as follows: (1) White

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[1]These facts distinguish White Wing's case from *Yee v. City of Escondido*, 503 U.S. 519 (1992), relied on by County (Opposition to Petition for Certiorari at 9-11), where the plaintiffs had never sought relief from the rent control ordinance they attacked, and contended "that the ordinance does not 'substantially advance' a 'legitimate state interest' no matter how it is applied . . . ." 503 U.S. at 533-534.

Wing requested County in July 1995 to exempt its property from the strict application of County's septic system mandate by a general plan amendment; (2) County categorically and unconditionally denied the requested amendment; (3) White Wing filed a timely[2] petition for writ of mandate to review that decision; and (4) the California courts denied White Wing's petition on the grounds that application of the septic system mandate to White Wing's property substantially furthered legitimate state interests, and separation of powers principles barred judicial interference with County's decision.

The California Court of Appeal acknowledged that White Wing's first cause of action for writ of mandate was grounded upon the claim that "[County] exceeded the scope of its police power when it refused to amend the general plan to allow use of a central wastewater treatment facility." (Appendix A at 5). In dismissing that claim, the Court stated that (1) "by virtue of [the separation of powers] doctrine, courts generally lack the power to order legislative bodies to enact particular legislation" and (2) "when a land use restriction is challenged solely on the ground that it assertedly exceeds a municipality's authority under the police power, the restriction withstands constitutional attack if it is 'fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.'" (*Id.* at 6, 8). County's attempt to relabel the latter holding as "dicta" (Opposition at 5 and 9 n.5), and its facile conclusion that "the state courts hearing this case declined to

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[2]County agrees that the applicable California statute of limitations is California Government Code § 65009(c)(1), which provided at the relevant time for commencement of an action within 120 days of the decision. White Wing filed its Verified Petition on August 20, 1995, 46 days after the Board of Supervisors' decision on July 5, 1995. (See Opposition at 7-8).

address Petitioner's constitutional takings claims" (*id.* at 10), is an exercise in fiction this Court should disregard.

The record is clear that White Wing sought a general plan amendment as a necessary prelude to residential development, that the proposed development relied on central wastewater treatment to achieve the density permitted under the West Central Solano County General Plan (one dwelling unit per two acres), and that White Wing could not achieve the permitted density with on-site septic systems. (See Petition at 6, 9 and n.16, 17).[3] The purpose of the amendment was not to "purchase an exemption from the statute of limitations" (cf. Opposition at 11), but to obtain exemption from the application of an unconstitutional development restriction by the only means available to White Wing under California law.[4]

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[3]County's opposition concedes these points (Opposition at 2 n.1, 3, 7); however, there is no record support for County's assertion (at 2 n.1) that "it is commonly assumed that, because of geologic and soil conditions, Petitioner's 1220-acre property could safely accommodate between 300 and 400 individual household septic systems." County's staff report stated only that the amendments would benefit White Wing by "overcoming the development limitation of the property's physical constraints which make on-site septic systems at minimum parcel size proposed infeasible . . . ." (See Brief of Amici Curiae to California Court of Appeal, Exhibit A at A-16).

[4]In California, any amendment to a local general plan requires legislative action by the local legislative body — County's Board of Supervisors in this case. Calif. Gov't Code §§ 65301.5, 65356. Such an amendment may be initiated by an affected landowner (Calif. Gov't Code § 65358), and the legislative body's action on the proposed amendment is expressly reviewable by petition for a writ of mandate under the California Code of Civil Procedure. Calif. Gov't Code § 65301.5.

2. White Wing's Challenge Fully Meets This Court's Requirements For Ripeness And Standing.

A landowner's claim that application of a development regulation effects a taking is ripe if "the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). To satisfy this requirement, a claimant must seek administrative relief from the regulation by a variance or other request for exemption. (*Id.* at 187-191).

County made clear, by its refusal to amend the general plan and the reasons it cited to justify that refusal (see Petition at 17-21), that it would not permit *any* development of White Wing s land that did not rely on individual, on-site septic systems. California law provides no procedure for obtaining a "variance" or "exemption" from the general plan, other than the amendment White Wing unsuccessfully pursued. County's opposition fails to identify any such procedure, and merely recycles under the heading of "ripeness" its contention that White Wing's purportedly "facial" challenge comes too late. (Opposition at 10-11).

County's contention that White Wing lacks standing is equally unfounded. As the Court just recently restated, standing requires that the plaintiff "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, ____ U.S. ____, 65 U.S.L.W. 4201, 4203 (March 19, 1997.) Here White Wing has been injured by inability to develop its property in the manner that County's overall development regulations would otherwise permit, County's septic system mandate is the source of the injury, and (see Section B below) the injury can be redressed by a favorable

decision. White Wing therefore has standing here, as it did below.

County's discussion of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), totally distorts the Court's opinion in that case. The Court never suggested in *Lucas* that a landowner could not challenge the application of a development regulation to its property merely because the state had already enacted the regulation when the property was acquired.[5] The Court simply stated that all titles are taken (and held) subject to the "background principles of the State's law of property and nuisance . . . " 505 U.S. at 1029. There are no "background principles" of California real property law that dictate the use of a technologically-inferior, environmentally-destructive method of wastewater disposal, nor any that make it a "nuisance" to use a licensed, state-of-the-art treatment facility that overcomes these deficiencies.

B. WHITE WING'S CLAIM DOES NOT REQUIRE THE COURTS TO PERFORM A LEGISLATIVE FUNCTION IN VIOLATION OF THE SEPARATION OF POWERS.

The separation of powers doctrine at the state level poses no obstacle to this Court's enforcement of White Wing's Fifth and Fourteenth Amendment rights. " 'The Fourteenth Amendment . . . was avowedly directed against the power of the States,' and so permits a federal court to disestablish local government institutions that interfere with its commands . . . To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution

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[5] Among other things, such a bizarre principle would create an artificial hierarchy of Fifth Amendment rights among landowners, according to how long they had owned their respective properties.

imposes on them." *Missouri v. Jenkins*, 495 U.S. 33, 55, 57 (1990.)

Despite this Court's unquestioned authority to override state separation of powers where no alternative is available (see, *e.g.*, *Missouri v. Jenkins*, 495 U.S. at 57-58), White Wing's petition does not remotely demand the exercise of such authority. White Wing seeks only a determination that the allegations of its Verified Petition state a takings claim that must be considered on the merits by the California courts. White Wing does not ask the Court to prescribe the relief those courts should grant if its claim is upheld.

White Wing recognizes, however, that this Court would be understandably reluctant to order local courts to entertain claims for which they could not grant effective relief, and that "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. at 51. Accordingly, White Wing will demonstrate that the California courts can order effective relief upon holding that County's regulation effects a taking of White Wing's land, consistent with both this Court's Fifth Amendment jurisprudence and the separation of powers doctrine in California law.

Although California courts do lack authority to order a legislative body to enact specific legislation (*e.g.*, *Serrano v. Priest*, 18 Cal. 3d 728, 751, 135 Cal. Rptr. 345, 357 (1976))[6], that does not prevent those courts from remedy-

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[6] In *Serrano*, the California Supreme Court affirmed a lower court decree that invalidated the entire California public school financing system and set a deadline for legislative reform of the system. The Court held that the trial court had been "wholly cognizant of the well-established principle, rooted in the doctrine of separation of powers, that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation . . . " 18 Cal. 3d at 751, 135 Cal. Rptr. at 357.

ing action by a legislative body that deprives a party of its constitutional rights.[7] In this instance, County's failure to amend its general plan leaves White Wing subject to an unconstitutional law, with no further avenue for relief. To remedy that condition, the California courts can issue a writ of mandate that orders County to reconsider its decision, and take further action, in light of the judicial determination that the septic system mandate is unconstitutional as applied to White Wing.[8]

Such an order would simply "afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction

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[7] *Mandel v. Myers*, 29 Cal. 3d 531, 174 Cal. Rptr. 841 (1981), illustrates the ability of California courts to uphold their constitutional determinations in the face of separation of powers limitations such as the legislature's exclusive authority to appropriate funds. In Mandel, the California Supreme Court affirmed a lower court judgment ordering a state official to pay an attorneys' fee award from a general departmental appropriation fund, despite the Legislature's deletion of a specific line item appropriation for payment of the award. The Court held that although "a court may neither directly compel the Legislature to appropriate funds nor order the payment of funds that have not been appropriated by the Legislature . . . *a variety of cases demonstrate that under some circumstances a court decision implementing constitutional rights may result in the expenditure of funds in a manner that the Legislature has not contemplated and yet pose no separation of powers problems whatsoever.*" 29 Cal. 3d at 539-540, 174 Cal. Rptr. at 846.

[8] As previously noted in the petition for certiorari (p. 24 at n.28), White Wing made clear to the California Court of Appeal that it sought only a "writ directing Respondents to set aside their decision and reconsider the matter [that] would not require Respondents to take any particular legislative action." White Wing did not forfeit its day in court on the substantive allegations of its Verified Petition, much less its Fifth Amendment rights, by initially seeking an overly broad form of relief. A pleading withstands general demurrer if it states a claim that entitles the pleader to *any* form of relief the court is empowered to grant. *E.g., Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546, 549, 99 Cal. Rptr. 745, 748, 750 (1972).

once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking." *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13, 32 Cal. Rptr. 2d 244 (1994). It would no more compel County to enact specific legislation than a judicial determination that governmental action constitutes a taking compels the legislature to exercise its power of eminent domain. "Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of the power of eminent domain." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

In ordering County to eliminate the unconstitutional application of its septic system mandate to White Wing, the California courts would be performing a *judicial*, not a *legislative* function. The proper operation of our constitutional scheme requires the judiciary to exercise authority within its own sphere intended to influence, without directly controlling, the actions of the legislative branch. "Separation of powers . . . 'd[oes] not mean that these [three] departments ought to have no partial agency in or no controul over the acts of each other', but rather that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." *Mistretta v. United States*, 488 U.S. 361, 380-381 (1989), quoting Madison, The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original.) Far from threatening the independence of the legislative branch, the exercise of a court's equitable powers to rectify the deprivation of constitutional rights "lies at the heart of the constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 52-53, 51 Cal. Rptr. 2d 837, 841-842 (1996.)

In summary, the California courts have demonstrated their ability to negate the effects of constitutionally invalid legislation without usurping legislative power. This Court can accordingly determine that White Wing has stated a claim for violation of its constitutional rights, and direct the California courts to proceed consistently with that determination, without requiring those courts to perform legislative functions in violation of the separation of powers.

CONCLUSION

White Wing's petition presents an important question under the holding of *Agins v. Tiburon*, 447 U.S. 255 (1980), that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ." *Id.* at 260. The California courts decided that question erroneously, and County's opposition provides no reason of substance why this Court should not exercise its plenary power to correct that decision.

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